Before The

Federal Communications Commission

Washington, D.C.

In the Matter of	)	
	)	
Implementation of Sections of the	)	MM Docket Nos. 92-266, 93-215
Cable Television Consumer	)	
Protection and Competition	)	
Act of 1992: Rate Regulation	)	

PETITION FOR EXPEDITED RECONSIDERATION

Public Interest Petitioners
Dr. Everett C. Parker
Henry Geller

May 16, 1994

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Summary

Consumers have a vital stake in the administration of the Cable Television Consumer Protection and Competition Act of 1992. Certainly no consumer interest is more important than the preservation and expansion of programming choices. It is only through such expansion that the medium will help ensure the promise that all voices in our society be heard, and all those with something to say will have a speakers' platform. Consumers will be shortchanged to the extent this fundamental purpose of the Act is overlooked, or if other goals are given higher priority.

The public interest values embodied in the 1992 Cable Act extend well beyond the cash register. Congress was concerned with far more than the amount cable operators charge, or that subscribers pay, for cable service. A principal focus of the Act was to increase programming diversity. Unfortunately, cable programming services have become the primary victims of the FCC's implementation of rate regulations. Of those programmers who are affected adversely, the most vulnerable are new services. And of the new services that are hurt, the greatest damage has been done to those seeking to fill special public interest niches. Ironically, the reregulatory process, at least in the short run, threatens to transform a medium of abundance into one of scarcity. This is not a good deal for consumers, and it certainly is not what Congress had in mind when it passed the Cable Television Consumer Protection and Competition Act of 1992.

In order to promote the vital consumer interest in diverse programming, the Commission should ensure that questions of diversity and programming incentives be accorded at least as high a priority as questions of price. Specifically, Public Interest Petitioners urge the Commission to immediately adopt the following changes, as detailed herein: (1) allow certain upgrade costs to be passed through as external costs; (2) modify its incentive structure for programming services to increase the opportunities for new services by replacing its current percentage-based approach; and (3) revise its complaint procedures so as not to impose a special penalty on operators who add channels to their systems.

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PETITION FOR EXPEDITED RECONSIDERATION

Dr. Everett C. Parker and Henry Geller ("Public Interest Petitioners"), pursuant to Section 1.429 of the Commission's Rules, request expedited reconsideration of certain rules affecting the launch of new cable television programming services.

The Parties

Petitioners have a long history of public interest advocacy before the Commission. Dr. Everett C. Parker is an Adjunct Professor at Fordham University and for many years was Director of the Office of Communication of the United Church of Christ. For more than three decades, the Office of Communication participated in FCC proceedings, defending First Amendment principles and the rights and interests of minorities, women and consumers. Henry Geller is a Communications Fellow with the Markle Foundation, a Senior Fellow at the Annenberg Washington Program of Northwestern University and a professor at Duke University. From 1978 to January 1981, Mr. Geller was Assistant Secretary for Communications and Information and Administrator of the National Telecommunications and Information Administration in the U.S. Department of Commerce. He served as General Counsel of the Federal Communications Commission from 1964 through September 1970.[1]

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[1]The positions articulated in this Petition are those of Petitioners alone and should not be attributed to any organizations with which they are affiliated.

The Problem

Consumers have a vital stake in the administration of the Cable Television Consumer Protection and Competition Act of 1992. Certainly no consumer interest is more important than the preservation and expansion of programming choices. It is only through such expansion that the medium will help ensure the promise that all voices in our society be heard, and all those with something to say will have a speakers' platform. Consumers will be shortchanged to the extent this fundamental purpose of the Act is overlooked, or if other goals are given higher priority. Implementation of interpretations of the Act that make it more difficult to initiate programming services oriented toward minorities, women, specialized populations or other small niches disserve the public. Such actions also limit the possibility of job creation, as many people who get their first job in mass media do so in small, startup operations. If the FCC's cable rate regulations are not administered with these considerations in mind, primary goals of the Cable Act may well be undermined.

In 1979 a lone television producer working in his apartment started a cable television channel for the deaf called the Silent Network. Concerned that the 28 million hearing impaired individuals in this country had no television programming directed to them, Sheldon Altfeld developed the channel with programming using sign language, sound and captions, as well as deaf entertainers. The network became the largest employer of hearing impaired individuals in the United States, with more than 200 people working both in front of, and behind the cameras. [2] By the time Altfeld sold the network in 1990, the Silent Network transmitted 21 hours of programming per week to 14 million subscribers. The network is currently being expanded to a 24-hour service designed to meet the needs of all types of disabled people and has been renamed the Kaleidescope Channel. Based on this experience, Altfeld now teaches seminars on how to start cable networks at the grassroots level. Last February, he was quoted in an Associated Press

[2] Declaration of Sheldon Altfeld, attached as Exhibit 1.

story as saying "[i]f you present something worthwhile, investors will beat a path to your door because they can see the long-range potential."[3]

The situation today is quite different. Sheldon Altfeld says that the Silent Network would not exist if he were trying to start it in 1994 under the new regulatory climate. [4] Based on his research into the current regulatory regime, Altfeld concluded that:

> [D]istribution for such vital programming services will be curtailed even further given the complex restrictions imposed. Limits on channel capacity will now make it extremely difficult, if not impossible to launch new networks that attempt to serve specialized niches.
>
> * * *
>
> I am presently working on new cable networks that will be of particular interest to the 50-plus market, latch-key kids, teens and the millions of Americans currently involved in 12-step programs. All of these groups have been virtually ignored by cable television, and I am afraid that with the direction the FCC is presently headed, there will be little incentive for cable operators to carry special-interest programming. [5]

Altfeld's experience is not unique. Cable operators all across the country are delaying expansion plans. Plans to add channels in the future are being put on hold while operators attempt to anticipate the regulatory decisions that will be made by local and federal officials. At the same time, potential investors in programming services are beating a hasty retreat, as the economic viability of new services remains in doubt.

The trade press is replete with examples of how the rules are restricting the introduction of new services. It sets out reports of many cable operators that they are unable to

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[3] Dunston, TV Producer Teaches How to Start a Cable Network From Scratch, Associated Press, February 18, 1994.

[4] Breznick, Network Wannabes Press On Despite Dour Launch Outlook, Cable World, April 11, 1994.

[5] Declaration of Sheldon Altfeld, attached as Exhibit 1.

add new programming services in the current regulatory environment. MSO executives have said that "the momentum toward system upgrades and rebuilds and addressability — and ultimately programming — will be severely impacted through the year."[6] They report being "frozen" or "in a straightjacket," and that "[t]he bottom line is that there's no strong economic incentive to cover the cost of launching a new service."[7]

Clearly, the burden falls most severely on new start-up networks.[8] According to one account, "many operators and existing programmers think the FCC's March 30 rate rules essentially sounded the death knell for new basic channels." This chilling prediction gains credence as an increasing number of new networks are forced to reschedule their launches. It has been reported, for example, that Golf Channel, World African Network, Planet Central, Parasol 4, Recovery Network, F.I.T, the Military Channel, Romance Classics, FYI Network, Inc., CNN International, The History Channel and Booknet have postponed their launches to later this year

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[6]Mitchell & Granger, Operators Give New Networks Little Attention, Multichannel News, March 7, 1994 at 3. Breznick, Movie Wars, Cable World, March 7, 1994 at 20 ("it's becoming doubtful many cable operators will be able to find the channel capacity for new services for at least the next year")' Breznick, Military Channel Delays Launch; CHC Picks Partners, Cable World, May 2, 1994 at 4.

[7]Mitchell, New Turner Ratecards Get Ops' Glance, Multichannel News, March 7, 1994 at 38; Kolbert, A Turner Channel Seeks Carriers, New York Times, April 11, 1994 at D5; Mitchell & Granger, Operators Give New Networks Little Attention, Multichannel News, March 7, 1994 at 3; Breznick, Network Wannabes Press on Despite Dour Launch Outlook, Cable World, April 11, 1994 at 1, 50 ("It doesn't appear there's an incentive to add any eggs to the regulated basket."); Breznick, Nets Checkmate? Cable World, March 28, 1994 at 36.

[8]Stern, Programmers, Broadcasting & Cable, April 11, 1994 at 51; Breznick, Nets Checkmate? Cable World, March 28, 1994 at 36.

or early 1995.[9] "You can take any headline that says 'X network is postponing its launch' and just fill in the blank," according to a top system operator, "Because you're going to see it happen one after another."[10] For many startup channels, delay of a remedy is denial of a remedy because many new networks lack the financial resources to survive until next year.[11]

The networks hardest hit are those who seek to serve a unique public service need. For example, it has been reported that C-SPAN has lost approximately 2.5 million subscribers since rate regulations went into effect last year, and has lost an additional 200,000 subscribers since the most recent rules were announced.[12] We acknowledge that a further cause of this most unfortunate diminishment of the "crown jewel" in cable's public service is the impact of "retransmission consent," whereby new broadcaster-originated channels are given a carriage preference over existing ones like C-SPAN and all other newcomers. This preference is the result of congressional, not FCC action. But its effect on the overall public interest in vital programming should be taken into account by the agency. Stated differently, it is all the more imperative for the Commission to act to promote editorial and enhanced programming choice in view of these circumstances.

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[9] Mitchell & Granger, Operators Give New Networks Little Attention, Multichannel News, March 7, 1994 at 38; Sharpe, Golf Channel Faces New Hazards as Cable Climate Shifts, Wall Street Journal, March 23, 1994 at B1 col 3 (Golf Channel postponed launch from July to January 1995); Mitchell, Multimedia Tries to Talk Way Into Ops' Lineups, Multichannel News, March 14, 1994 at 10; Davatzes, Quality Cable at Risk, Washington Post, April 27, 1993 at A23; Breznick, Military Channel Delays Launch; CHC Picks Partners, Cable World, May 2, 1994 at 4; Breznick, Network Wannabes Press On Despite Dour Launch Outlook, Cable World, April 11, 1994 at 50 ("most prospective basic networks have run into trouble securing firm, specific carriage commitments"); Breznick, Nets Checkmate? Cable World, March 28, 1994 at 36.

[10] Mitchell & Granger, Operators Give New Networks Little Attention, Multichannel News, March 7, 1994 at 38. Stern, Programmers, Broadcasting & Cable, April 11, 1994 at 51; Breznick, Movie Wars, Cable World, March 7, 1994 at 20.

[11] Mitchell & Granger, Operators Give New Networks Little Attention, Multichannel News, March 7, 1994 at 38; Breznick, Movie Wars, Cable World, March 20, 1994 at 20.

[12] Stern, FX Factor: C-SPAN Minus 200,000 Subs, Broadcasting & Cable, May 9, 1994 at 53; Granger, Lamb Details Plex Plans, Multichannel News, March 14, 1994 at 10.

The gravity of the situation is also exemplified by the current status of Horizons TV. One year ago the Public Broadcasting Service, along with WGBH, Boston and Thirteen/WNET in New York announced the formation of a cable channel - Horizons - to give Americans greater access to the nation's greatest thinkers, scientists, authors artists and teachers. Horizons emphasized community service, by giving cable operators the right to offer the service free of charge to schools, libraries, museums, prisons, nursing homes and other public institutions. This non-profit venture was endorsed at the time by four major MSOs representing more that 6.5 million subscribers, and was poised to launch at the end of 1994. Today, by contrast, Horizon's future is far from certain. The level of interest among cable operators has cooled and the proposed launch has been postponed. The problem is also demonstrated by Black Entertainment Television, which has informed the Commission that the small size of the pass through incentives fails to promote minority-oriented channels.[13]

It is thus clear that programmers have become victims of the "reregulatory process." Of those programmers who are affected adversely, the most vulnerable are new services. And of the new services that are hurt, the greatest damage has been done to those seeking to fill special public interest niches. Ironically, the reregulatory process, at least in the short run, threatens to transform a medium of abundance into one of scarcity. This is not a good deal for consumers, and it certainly is not what Congress had in mind when it passed the Cable Television Consumer Protection and Competition Act of 1992.

I. Rate Regulation is Not the Primary Purpose of the 1992 Cable Act; Other Goals Have Equal Stature.

The public interest values embodied in the 1992 Cable Act extend well beyond the cash register. Congress was concerned with far more than the amount cable operators charge, or that subscribers pay, for cable service. Indeed, this comprehensive legislation addressed many aspects

[13] *See* Ex Parte Letter from Maurita K. Coley to William F. Caton, May 9, 1994.

of video delivery service, including program access, carriage rights for broadcasters, leased access, inside wiring, equipment compatibility, access to sports programming, horizontal and vertical ownership limits and, of course, reasonableness of rates.

Rate regulations undoubtedly are an important part of the law, but they were by no means the preeminent concern of Congress — at least as that concern was expressed in the statute. Of the twenty-one "findings" listed in the Act's first section, only one directly discusses the price of cable television service. 47 U.S.C. § 521(A)(1). To whatever extent this emphasis leaves any doubt about congressional priorities, the Act was clear in its Statement of Policy the primary concern was with programming, not price. Section 521(b) specified that [i]t is the policy of Congress in this Act to —

> (1) promote the availability to the public of a diversity of views and information through cable television and other video distribution media;
>
> (2) rely on the marketplace, to the maximum extent feasible, to achieve that availability;
>
> (3) ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems;
>
> (4) where cable systems are not subject to effective competition, ensure that consumer interests are protected in the receipt of cable service; and
>
> (5) ensure that cable television operators do not have undue market power vis-à-vis video programmers and consumers.

47 U.S.C. § 521(b).[14] The only statutory purpose that appears to focus directly on rates is number four, which seeks to "ensure that consumer interests are protected in the receipt of cable service." But it is important to note that consumers have interests other than price. They also have a vital stake in the availability of diverse and high-quality programming. Perhaps for that reason the fifth statutory objective seeks to ensure that cable operators do not have excessive

[14]The Statement of Policy was adopted in Conference without change from the Senate cable bill, S. 12. *See* CONF. REP. 102-862, 102d Cong., 2nd Sess. (Sept. 14, 1992) at 58.

market power over cable programmers and consumers. Consequently, any interpretation of the Act that undermines programmers' interests necessarily undermines consumer interests.

With any comprehensive law, the potential exists for one policy goal to overwhelm other legislative values. This is why legislatures establish overriding statements of policy and why, in this case, the unambiguous language of Section 521(b) should provide the FCC with its touchstone for interpreting the Act. The Senate Commerce Committee provided the following guidance:

> The rate regulation provision also requires the FCC, upon complaint, to ensure that rates for most other cable programming services are not unreasonable. This will impose a greater regulatory burden on the FCC and cable operators not subject to effective competition. The Committee believes that *the FCC should carry out this obligation consistently with the policies of the legislation* and with the least amount of regulation necessary to accomplish this goal.

S. Rep. 102-92, 102d Cong., 1st Sess. (June 28, 1991) at 68 (emphasis added). As this language attests, any interpretation of the law which places a higher priority on rate reductions and less focus on the promotion of channel capacity and programming diversity is a fundamental misreading of the Cable Act and its legislative history.

II. The Commission Must Revise its Approach to Cable Rate Regulations

The Commission has expressly noted that the mandate to reduce subscriber rates will take precedence over other statutory goals. In the *Second Order on Reconsideration*, FCC 94-38 (released March 30, 1994) at ¶ 59, the Commission rejected objections that its rules would reduce investment in cable system capacity, stating that it "must balance this concern with the goal of establishing reasonable rates for regulated cable services." At each decision point, when faced with a choice between allowing programming investment or further rate reductions, the Commission opted for lower rates. Yet, paradoxically, the Commission acknowledged that the financial incentives to invest in the cable industry "depend on the prospect of future returns, which in turn depend on future demand and how rates will be regulated on a going-forward basis." *Id.*

at ¶ 57. However, a review of the "going forward" rules demonstrates that the Commission has paid insufficient attention to the need to promote new programming services.

A. Programming Investment Incentives

Additional channel capacity will best promote new programming, and that in turn depends, to a large extent, on secure investment incentives. We deal here with one facet of the investment incentives -- that involving programming. Unfortunately, while the Commission said that it is seeking to "promot[e] innovation, investment, and growth in the cable industry," *Second Order on Reconsideration* at para 54, the "going forward" rules it adopted raise considerable problems.

The principal problem is that the FCC has made clear that it will encourage investment in new unregulated services at the expense of new investment in basic channels. Unfortunately, this necessarily means that consumers will be deprived of growth in basic services.

According to the Commission, it is seeking to encourage "economically efficient investment," which it defines as not placing "investment risk . . . on today's consumers of regulated services." *Id.* at para. 57, 60. In other words, in the interest of holding down rates, the Commission is seeking to support future investments through the offering of new services that may (or may not) develop, rather than through rates for regulated services. Despite the need for increased capacity for basic and enhanced basic services, the Commission is quite clear that it intends to focus on investment for unregulated services. It emphasized that by forcing down rates for regulated services, "regulation may spur cable industry entrepreneurs to devote increased effort to innovate" and that "innovative new services (i.e., those offered 'a la carte' or not fitting within the traditional definition of cable television) will not be subject to rate regulation." *Id.* at para 57-58. The FCC acknowledges that "investment could initially be adversely affected by reductions in the cash flows generated by current regulated services" but concludes that investment eventually will pick up because "many operators will have opportunities to generate steadily increasing cash flows from unregulated services." *Id.* at para 59. *See also id.* at para 61.

The Commission presented these conclusions in an "analytical overview" in which it reviewed "the likely effect of our actions" and which confirmed that decisions "[t]hroughout this

Order" relating to "growth in programming services, channel additions and deletions, and system upgrades" are based on the economic principle of holding down basic rates. *Id.* at para. 54, 57. This simply confirms that the Commission's overriding emphasis on "assuring that rates for regulated services are reasonable," *id.* at 61, was pursued to the exclusion of other policy goals. Indeed, the Commission frankly acknowledged that it was willing to accept reduced investment in basic cable services on the theory that cable operators would be forced to invest in new and unregulated services..

To the extent that this policy can be characterized as an effort to choke off investment in basic cable channels, it certainly appears to have been a success. It explains why so many launches have been postponed, and why cable operators generally are discouraging the launch of any new programming networks for at least the rest of this year. But the Commission's policy must be examined more critically. What the FCC describes as "short-term investment effects," *id.* at para. 57, are *permanent* with respect to basic programming services. The design of the rules is to force regulated rates to be "reasonable," and thereby channel future investments into unregulated services. Unfortunately, no one told the dozens of prospective programmers who are striving to start basic networks that they would be conscripted into this plan, or that many of them would pay the supreme sacrifice. This is the inevitable effect of choosing price over programming as the overriding policy goal.

Yet even the investment in unregulated services that the Commission is seeking to encourage is unlikely to occur. The *Second Report on Reconsideration* recognized the importance of "a stable and predictable regulatory scheme" and acknowledged that "an uncertain environment . . . can discourage investment." *Id.* at para. 66. But no investments in system upgrades are permitted unless a cable operator first receives approval in a "streamlined" cost of service proceeding. *Report and Order and Further Notice of Proposed Rulemaking*, FCC 94-39 (released March 30, 1994). A more "uncertain environment" is difficult to imagine. No form has yet been issued for such proceedings, and the procedure is to be used only for "significant upgrades," a term the Commission has not defined. *Id.* at para 287. Only capital investments that "actually will benefit subscribers" will be approved, yet the nature of non-traditional services makes it difficult to predict how consumers may benefit. Similarly, the Commission is seeking to promote new and innovative new services but will not permit recovery of any "frivolous or inefficiently incurred costs." *Id.* at para. 287. In short, it is impossible to tell in advance whether a given cost showing would be approved by the FCC.[15]

B. Other FCC Actions Skew the Programming Process

In addition to the rules governing investment in new capacity, the Commission must revise the incentive structure for new programming services. Without adequate incentives, operators will not introduce new services to their subscribers. Or worse, incentives could encourage operators to select programming solely because of its regulatory treatment, and not based on the quality of a particular program offering. The Commission also must act to remove regulatory impediments to adding new networks.

The FCC established its going forward methodology on the assumption that a 7.5 percent markup on new programming services would permit operators to charge "market driven prices" and that consumer demand would determine the success or failure of new networks. *Second Order on Reconsideration* at para 62. This methodology, however, suffers from a number of fundamental flaws. First, it does not establish a "market-driven" price, and thefore does not provide an adequate incentive to add new programming services. Second, it promotes the addition of higher-priced services over lower-priced networks, thereby creating a regulatory bias

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[15]It also is unlikely that the Commission's experimental "upgrade incentive plan" will produce much new investment in channel capacity. To qualify, an operator must first agree to freeze existing rates and services for a period of years and to apply to the Commisson for increased flexibility for new services. This alternative appears to offer operators no advantages to the extent unregulated services could be added without a commitment to freeze existing rates. Moreover, applications for the experimental program could be subject to substantial delays. Although not part of this FCC program, the request of Viacom, Inc. for rate flexibility for its innovative services in Castro Valley is not encouraging. Viacom has been waiting approximately one year for a Commission decision on its request.

that thwarts programming selectons based on consumer preferences. Third, the incentive does not outweigh other regulatory barriers that may prevent the addition of any new services.

Any markup based on a small percenage of the programmer's licensing fee does not approximate a market driven rate. Last year, when the Commission surveyed cable systems to establish its initial rate benchmarks, it found that an average price per channel, depending on system characteristics, was 40 to 50 cents. By contrast, a pricing structure based on the Commission's methodology yields a very different result. A network with a 10 cent licensing fee, for example, would receive an incentive markup of less than one cent. While it is attractive to contemplate the possibility of receiving programming services for a far lower price, it is so only to the extent the programming comes into being in the first place. Unfortunately, as documented above, it is becoming increasingly clear that new programming services are at risk.

This is particularly true for the lower-priced services for which a percentage markup is all but meaningless. There is absolutely no incentive to add programming networks that do not charge a licensing fee, and every incentive to replace low priced networks with those that carry a higher markup. This is precisely what has happened to C-SPAN, which already has lost over 2.5 million subscribers and projects its loss to reach 3 million. The Commission must address this regulatory imbalance.

Additionally, the Commission must consider the extent to which its complaint procedures uniquely discriminate against the addition of new services and promote stagnation. In its initial *Report and Order*, the Commission ruled that a complaint filed in response to any rate increase (*e.g.*, when new channels are added) triggers review of the cable operator's entire rate structure, and not just the amount of the increase. *Report & Order*, FCC 93-177 para. 375, n.907. *See also* News Release, Mim. No. 41723 (released Feb. 9, 1994). This interpretation applies even where a cable system has never received a previous rate complaint. The Cable Act otherwise precludes review of previous rates, because any complaint must be filed within a "reasonable period" after the effective date of the rules.[16]

The Commission's present approach to rate complaints after a channel upgrade, under which it proposes to examine the entire rate structure, is inconsistent with the Act and legislative history.[17] Congress established a complaint driven process, and was quite clear in requiring that any complaints must be filed within a reasonable time following an increase or it was barred. To the extent the Commission's procedural rules allow the previous rate structure to be reexamined at a later time, the time limits are nullified. But more ominously, the event triggering such review is "a change in a system's service tiers." *Third Order on Reconsideration*, at para. 121. Thus, in addition to being contrary to the Act, this procedural rule creates a powerful disincentive for cable operators to add to their service tiers.

III. The Commission's Current Interpretation of the Cable Act Creates a Substantial First Amendment Problem

By placing an overwhelming emphasis on matters of price to the detriment of programming, the Commission has implemented rate regulations in a manner that is inconsistent with the Cable Act. Such an administrative construction of a statute is invalid to the extent it violates the statutory mandate or if it "frustrate[s] the policy that Congress sought to implement." *Securities Industry Assn. v. Board of Governors of the Federal Reserve System*, 468 U.S. 137, 143 (1984); *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981). But to the extent

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[16]The Cable Act permits rate complaints to be filed with the FCC only during the 180 day period following the effective date of the rules -- a period that began on September 1, 1993 and expired on February 28, 1994. 47 U.S.C. Sec. 543(c)(3). The Commission has interpreted this statutory limitation strictly, and has held that after this window closes, the Cable Act "bars complaints challenging the reasonableness of cable programming service and associated equipment rates existing as of the effective date of our rules." *Report and Order* at para 335. After the initial 180 day complaint period, the rules allow complaints to be filed within 45 days of any change in service provided to a subscriber, including any rate increase or decrease that results from a change in the system's service tiers. *Third Order on Reconsideration*, FCC 94-40 at para 121 (released March 30, 1994).

[17]See S. Rep. 102-92, 102 Cong., 1st Sess. at 74; H. Rep. 102-628, 102 Cong., 2d Sess. at 87; Conf. rep. 102-862, 102d Cong., 2d Sess. at 61.

the Commission's approach harms the launch or survival of programming services, it also violates the First Amendment.

This is not to suggest that rate regulation is a *per se* First Amendment problem. Indeed, the U.S. District Court for the District of Columbia upheld the FCC's cable rate regulations as being "wholly unrelated to content" because the rules relied on factors "of a cost accounting nature." *Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1, 7 (D.D.C. 1993). But that ruling was issued before the Comission implemented the rules in such a way as to favor unregulated channels over basic networks, and before it articulated going forward rules that discriminated against lower-cost networks. Nothing before the court suggested that the Commission's rate regulations would cause such substantial and arbitrary distortion in the cable programming market.

The latest round of rate orders has severely handicapped the market for new programming services. The Commission's formula reduces the opportunities for channel expansion and favors higher priced networks. As a direct result, those few services that find distribution in the next year will not be those networks directed toward specialized populations. The greatest victims of the rate regulations will be those channels that would have made the greatest contribution to diversity -- services directed toward minorities, women, the elderly or the handicapped. *See* Declaration of Sheldon Altfeld, attached as Exhibit 1. This unconstitutional result follows directly from the Commision's misreading of legislative priorities.[18]

IV. The Commission Must Immediately Modify its Rate Regulations to Preserve Opportunities for New Programming Services

With each passing day, a growing number of programming services are deciding to delay their introducton to the public. Some may be lost forever. To minimize such losses, the

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[18]*See, e.g., Rust v. Sullivan*, 500 U.S. 173 (1991); *Debatolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568 (1988); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) ("an Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available").

Commission should review its rate rules with appropriate sensitivity to the regulatory effect of programming providers. Specifically, the Commission should take the following immediate steps:

1. The Commission should not require a cost of service showing every time an operator seeks to expand channel capacity. Instead, the Commission could allow certain upgrade costs to be passed through as external costs. This would be especially appropriate where the expansion plans are the subject of an agreement with local franchising authorities. Local officials are in a better position than the Commission to assess their community's needs, and would be able to negotiate to avoid excessive increases. Moreover, the Commission already allows external cost treatment of PEG expenditures, subject to the safeguard that large expenses can be spread over an extended time. *See* Public Notice, Mimeo No. 42927 (released May 6, 1994) (Question 12). Such a change would help facilitate the expansion of channel capacity. The Commission also should fill in the details of its streamlined cost of service approach.

2. The Commission should modify its incentive structure for programming services to increase the opportunities for new services. It should replace its current approach based on a percentage of the licensing fee and provide more stable investment incentives. New networks could be accorded a "constructive" rate that allows the pass-through of a value equal to the average price for existing networks on a tier. This would provide a guaranteed incentive for new services, and would eliminate the bias in favor of higher-priced networks. There undoubtedly will be a number of proposals for assigning a value to programming pass-throughs. The most important consideration for the Commission is to eliminate the current drawbacks of a percentage-based approach.

3. Finally, the Commission must revise its complaint procedures to conform to the Cable Act limits. The Commission should not impose a special penalty on operators who add channels to their systems by forcing review of the entire rate structure. Any review should be limited to the amount of the rate increase, as the Act requires.

Conclusion

Cable television has provided an abundance of expression that has markedly served the public interest, including the underlying promise of the First Amendment. *See Associated Press v. United States*, 326 U.S. 1, 26 (1945). Yet amidst the promise of plenty, there still has been too little room for minority voices and other specialized programming. The Commission must take care that, in administering its many responsibilities under the Cable Act, the prospect for such programming alternatives is made to grow brighter, not dimmer. Only the FCC can act immediately to help such programming services in this very difficult time. It should not hesitate to do so, and should grant the above-described relief.

Respectfully submitted,

By Henry Geller

Public Interest Petitioners
Dr. Everett C. Parker
Henry Geller

May 16, 1994

EXHIBIT 1

DECLARATION OF SHELDON I. ALTFELD

I, Sheldon I. Altfeld, declare under penalty of perjury that the following is true and correct to the best of my knowledge, information and belief.

Since 1950, I have worked in every aspect of the entertainment industry, including radio, television, motion pictures, stage productions and recording. I have produced, written and/or directed more than 2,000 TV shows for NBC, ABC, CBS, PBS, Metromedia, FOX, Disney and various cable networks. In addition, I have produced over 3,000 hours of radio programming and more than 200 stage productions. During my career, I have been nominated for Emmy Awards twelve times and won four Emmys.

In 1979, I founded The Silent Network, the first cable TV programming service for the hearing impaired. I currently serve as Vice President of Production and Network Operations for Action America, a viewer participation problem-solving network, and am a consultant to a number of startup cable TV network ventures. I am currently conducting a series of seminars across the United States on the subject of "How to Start Cable TV Networks," and am writing a book on that subject.

At the time that I created The Silent Network, it was the nation's only cable network for the deaf and hard-of-hearing audiences. During the time I ran the network, it expanded from a two-hour-per-week programming service to a network that provided twenty-one hours per week of programming reaching 14 million subscribers. I became the nation's largest employer of deaf and hearing-impaired individuals, with more than 200 people working in all facets of the operation, both in front of and behind the cameras. Prior to selling the network in 1990, I developed a companion programming service called America's Disability Channel to serve the informational needs of the nation's 43 million disabled individuals.

From the very beginning, finding distribution for The Silent Network was extremely difficult. Major cable operators were reluctant to transmit a service that they perceived as "too small a niche," in spite of the fact that we were only on for two hours per week. Eleven years later, even after former President Bush signed the Americans With Disabilities Act, we still had tremendous difficulties convincing cable operators that this underserved market could support a network, despite the fact that it demographically is larger than the African-American community and the Hispanic community in the US combined. In spite of these difficulties in obtaining distribution, the concept of this specialized channel succeeded because it was a good idea and because there was a significant audience need.

Unfortunately, I do not believe it would be possible to start The Silent Network or America's Disability Channel today. My research into current FCC rules indicates that distribution for such a vital programming services will be curtailed even further given the complex restrictions imposed. Limits on channel capacity will now make it extremely difficult, if not impossible to launch new networks that attempt to serve specialized niches. Once again, viewers will be short-changed as regulations reward cable operators for carrying only expensive major networks.

I presently am working on the development of new cable networks that will be of particular interest to the 50-plus market, latch-key kids, teens and the millions of Americans currently involved in 12-step programs. All of these groups have been virtually ignored by cable television, and I am afraid that with the direction the FCC is presently headed, there will be little incentive for cable operators to carry this important special-interest programming.

Sheldon I. Altfeld
Los Angeles, CA

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